

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

RICHARD D. STECKLY

Claimant

VS.

AGCO CORPORATION

Respondent

AND

AMERICAN ZURICH INSURANCE COMPANY

Insurance Carrier

Docket No. 1,039,054

ORDER

Claimant appealed the July 25, 2012, Award entered by Administrative Law Judge (ALJ) John D. Clark. The Workers Compensation Board heard oral argument on January 23, 2013.

APPEARANCES

Matthew L. Bretz of Hutchinson, Kansas, appeared for claimant. Robert G. Martin of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. At oral argument, the parties stipulated that claimant is entitled to four weeks and two days (4.29 weeks) of temporary total disability benefits at the rate of \$472.37 per week for a total of \$2,026.47 due to an order filed on March 20, 2012, extending the parties' terminal dates to April 19, 2012.

ISSUES

In the July 25, 2012, Award, ALJ Clark adopted the functional impairment opinion of Dr. Paul S. Stein and found claimant sustained a 5% whole body functional impairment. With regard to the issue of work disability, the ALJ stated:

The Court also adopts the opinion of Dr. Stein that the Claimant has no restrictions as a result of his work-related injury; and therefore is not entitled to a permanent partial disability based on a work disability as set out in K.S.A. 44-510e(a).¹

Claimant contends his whole body functional impairment is 7.5%, which is an average of the ratings of Dr. Pedro A. Murati (10%) and Dr. Paul S. Stein (5%). He also argues he is entitled to work disability benefits as he has sustained a wage loss greater than 10%.

Respondent requests the Board find claimant is entitled to permanent partial disability benefits for a whole body functional impairment only.

The issues before the Board on this appeal are:

1. What is claimant's functional impairment?
2. Is claimant entitled to a work disability? If so, what is claimant's work disability?

FINDINGS OF FACT

After reviewing the entire record and considering the parties' arguments, the Board finds:

Claimant sustained a low back injury on February 22, 2008. Respondent, in its submission letter to the ALJ, stipulated that claimant met with personal injury by accident on February 22, 2008, and that claimant gave proper notice and made timely written claim. In his Award, ALJ Clark provided a description of the accident and detailed claimant's age and educational background. Therefore, a further account of those facts is unnecessary.

The same afternoon that the accident occurred, claimant went to see his chiropractor, Dr. Joshua L. Gill. Claimant testified he initially did not return to work because of the lifting restrictions he was given by Dr. Gill. Claimant testified that he also received treatment a few times from Dr. Chris Rodgers and was discharged by respondent a few days after being released by Dr. Rodgers. Respondent felt claimant's back injury was not work related and denied medical treatment. Claimant never returned to work for respondent.

At the request of his attorney, claimant was evaluated by Dr. Pedro A. Murati on January 7, 2009. Dr. Murati reviewed the chiropractic records of Dr. Gill. Dr. Murati testified claimant's x-rays taken by Dr. Gill revealed no apparent fractures or soft tissue

¹ ALJ Award at 4.

pathology. Claimant denied having any significant prior back injuries. Claimant made complaints to Dr. Murati of sharp pains in the mid to lower back, numbness and tingling in the left shoulder going down into the arm, numbness and tingling in the right leg, being unable to sleep at night due to back pain, and difficulties sitting or standing for long periods of time due to mid to lower back pain. Dr. Murati's impression was low back pain with signs and symptoms of radiculopathy.

Dr. Murati's temporary restrictions for claimant were to work as tolerated and to use common sense. Dr. Murati also recommended claimant undergo an MRI of the lumbar spine and a bilateral lower extremity NCS/EMG to include the lumbar paraspinals. Based upon the results of the foregoing diagnostic tests, Dr. Murati recommended physical therapy, anti-inflammatory and pain medications as needed and a series of lumbar epidural steroid injections. If conservative treatment failed to resolve claimant's symptoms, Dr. Murati recommended claimant be referred for a surgical consultation.

A preliminary hearing was held on May 14, 2009, to address claimant's request for medical treatment and that respondent be ordered to pay Dr. Murati's bill as an unauthorized medical expense. In a May 14, 2009, Order, ALJ Moore ordered claimant to undergo a neutral independent medical examination by Dr. Paul S. Stein. Dr. Stein was to offer opinions on diagnosis, treatment recommendations, and whether claimant's condition was causally related to the February 22, 2008, accident or was a natural progression of a preexisting condition. ALJ Moore's Order authorized Dr. Stein to perform or refer claimant for such additional diagnostic tests as were reasonably necessary for Dr. Stein to render his opinions and recommendations.

Dr. Stein examined claimant on December 16, 2010, but did not order any diagnostic tests. Claimant reported having pain in his back, radiating around both flanks with coughing and sneezing, and extending down into his lower extremities. Dr. Stein's examination of claimant was described as fairly benign, and claimant had no neurological deficit in his extremities. Claimant had intact reflexes in the lower extremities, there was no tenderness to palpation in his lower back and his range of motion was relatively good. Dr. Stein indicated he could not determine the presence of a preexisting chronic back problem and there was no way to medically determine if claimant sustained an injury at work on February 22, 2008. Dr. Stein stated that a lumbar and thoracic MRI might be of benefit, but did not recommend an EMG/NCT study. He agreed with Dr. Murati that physical therapy, anti-inflammatory and pain medications, and a series of lumbar epidural steroid injections should be based upon the test results.

In a letter to claimant's attorney dated August 2, 2010, and without again seeing claimant, Dr. Murati opined claimant fell within DRE Lumbosacral Category III of the

*Guides*² and had a 10% functional impairment. No restrictions were provided in the letter. Dr. Murati indicated claimant had radiculopathy which was evidenced by a loss of reflexes and a loss of sensation.

On April 13, 2011, without seeing claimant again, Dr. Murati completed a form entitled "Release to Return to Work,"³ which sets out claimant's restrictions. Those restrictions included no crawling; rarely bending, crouching and stooping; occasionally sitting, climbing stairs and ladders, squatting and driving; frequently standing and walking; no lifting, carrying, pushing or pulling more than 35 pounds and that only occasionally and no more than 20 pounds frequently; and to alternate sitting, standing and walking. Dr. Murati opined claimant could no longer perform 18 of the 19 non-duplicative job tasks he performed in the 15 years prior to the accident as determined by vocational expert Dr. Robert W. Barnett.

Without seeing claimant again, Dr. Stein sent a note to both parties dated August 7, 2011, opining claimant was in DRE Thoracolumbar Category II of the *Guides* and had a 5% functional impairment. Dr. Stein stated that, "Unless a thoracic MRI scan were done and documented the presence of structural pathology to account for the patient's symptoms, I can make no medical requirement for permanent work restrictions."⁴ Dr. Stein testified that one of the main reasons physical restrictions are imposed is to prevent further injury. With regard to task loss, the following testimony was elicited from Dr. Stein:

Q. (Mr. Martin) With not being able to assess any permanent restrictions on Mr. Steckly, fair to say then you are not able to say that this man definitively has any particular task loss as to the essential job functions he may have had over the previous 15 years?

A. (Dr. Stein) That's correct.⁵

Dr. Stein was deposed a second time on May 17, 2012, after claimant had undergone a thoracic MRI at the Kansas Spine Hospital on March 28, 2012. The MRI revealed degenerative changes that were usual, with the primary pathology a syringomyelia or hydromyelia. Dr. Stein testified that inside the spinal cord there is sometimes a collection of fluid. A little central canal goes through the spinal cord, and if there is a blockage of spinal fluid flow, that canal can start to expand. When the canal expands enough, pressure is put on the spinal cord, and can cause problems. Dr. Stein opined

² American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

³ Murati Depo., Ex. 3.

⁴ Stein Depo. (Mar. 13, 2012), Ex. 3.

⁵ *Id.*, at 9.

within a reasonable degree of medical probability the syringomyelia was not caused by the work incident, and there was no real relation between the syringomyelia and the work injury, which Dr. Stein believed was a soft tissue strain or sprain. Dr. Stein testified syringomyelia can be caused by trauma. However, in such an instance the syringomyelia is focal and does not go all the way up and down the spinal cord. After reviewing claimant's MRI, Dr. Stein ruled out traumatic syringomyelia.

It was Dr. Stein's opinion, after reviewing the thoracic MRI, that claimant did not require any permanent restrictions as the result of his work-related injury. He testified, "Now, he [claimant] has discomfort. That's a subjective thing. I can't tell you how much he has or not. And he might limit his activities, self limit based on discomfort. But there's nothing there that I can say if he does X and X type of work, he's going to damage his spine."⁶ At his second deposition, Dr. Stein indicated he was being very liberal by placing claimant in DRE Thoracolumbar Category II.

Respondent employed vocational rehabilitation counselor Dan R. Zumalt to determine the tasks claimant performed in the 15 years before February 22, 2008. Mr. Zumalt interviewed claimant and reviewed the Release to Return to Work form of Dr. Murati dated April 13, 2011, and the December 16, 2010, and August 7, 2011, reports of Dr. Stein. It was the opinion of Mr. Zumalt that based upon Dr. Stein's August 7, 2011, report, claimant would have no task loss. Based upon Dr. Murati's restrictions, Mr. Zumalt opined claimant would no longer be able to perform 10 of 35 non-duplicative tasks for a 28.57% task loss.

After being discharged by respondent, claimant testified he was unemployed for about a month. He then worked two months for Farmers Coop making \$9 per hour, 40 hours per week. Claimant testified he began working for Titus Transportation in August 2008. Claimant testified at his deposition that he began working for Fifth Wheel Yard and Truck Service in the middle of October 2011, and was making \$12 per hour, 40 hours per week, and no overtime or fringe benefits.

Mr. Zumalt's February 23, 2012, report indicated claimant was self-employed driving a tractor-trailer from October 2010 until October 2011, but no income information was available. Mr. Zumalt indicated that the Kansas Wage Survey shows that a truck driver of a tractor-trailer would earn \$19.41 per hour or \$776.40 per week for a 40-hour week. Mr. Zumalt opined claimant would have no wage loss while working as a truck driver. Claimant reported to Mr. Zumalt of working for Fifth Wheel commencing in October 2011, and made \$12 per hour or \$480 per week.

Dr. Barnett's June 3, 2011, report indicated claimant was working as a self-employed truck driver making \$500 per week.

⁶ Stein Depo. (May 17, 2012) at 8-9.

ALJ Clark awarded claimant “4.29 weeks of temporary total disability compensation at the rate of \$472.37 per week or \$2,026.47 for a 5% work disability, making a total award of \$2,026.47.”⁷

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.⁸ “‘Burden of proof’ means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party’s position on an issue is more probably true than not true on the basis of the whole record.”⁹ It is the function of the trier of fact to decide which testimony is more accurate or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability.

The Board affirms the ALJ’s finding that claimant has a 5% whole person functional impairment. Dr. Stein’s opinion on functional impairment is more credible than the opinion of Dr. Murati. Dr. Murati examined claimant on January 7, 2009, and indicated claimant should undergo additional testing, needed additional medical treatment and had not yet reached maximum medical improvement. Without seeing claimant again, Dr. Murati, nearly 19 months later, opined claimant had a 10% functional impairment and fell within DRE Lumbosacral Category III. Dr. Murati found claimant had radiculopathy as evidenced by a loss of reflexes and sensation. When Dr. Murati examined claimant, no radiological tests were performed to confirm he sustained radiculopathy. Dr. Murati’s functional impairment opinion might have been credible had he examined claimant after he had reached maximum medical improvement.

Dr. Stein testified at his first deposition that without an MRI, a structural injury had not been documented. After reviewing an MRI of claimant’s thoracic spine, Dr. Stein concluded claimant sustained a soft tissue sprain or strain at work. Claimant also had a syringomyelia, a progressive disorder that was not work related. When Dr. Murati rendered his opinions, he did not have the benefit of reviewing the MRI.

The Board finds that claimant sustained no task loss. Dr. Murati assigned claimant permanent restrictions on April 13, 2011, over two years after he last examined claimant. There is insufficient evidence that Dr. Murati reviewed any additional medical records or claimant’s MRI before imposing permanent restrictions or rendering a task loss opinion. Frankly, Dr. Murati’s opinions as to claimant’s functional impairment, permanent restrictions

⁷ ALJ Award at 4.

⁸ K.S.A. 2007 Supp. 44-501(a).

⁹ K.S.A. 2007 Supp. 44-508(g).

and task loss are unreliable and untrustworthy. Dr. Stein's opinion on task loss is more credible. He was forthright in stating that he could not give an opinion on whether claimant needed permanent restrictions until claimant underwent a thoracic MRI. Once Dr. Stein was able to review the MRI results, he was able to determine claimant did not require permanent restrictions to prevent further injury.

Claimant's attorney argued at oral argument that Dr. Stein imposed restrictions that claimant not lift more than 100 pounds and not perform tasks that hurt. However, Dr. Stein testified that those are admonitions he gives everybody. The Board does not consider Dr. Stein's aforementioned recommendations as permanent restrictions but, rather, commonsense advice for everyone.

K.S.A. 44-510e(a), in part, states:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment.

The Board finds the ALJ erred by not awarding claimant work disability. Claimant has a permanent partial general disability. In such instances, K.S.A. 44-510e(a) requires claimant's wage loss and task loss to be averaged to determine claimant's work disability. In *Graham*,¹⁰ the Kansas Supreme Court weighed in on this issue when it stated in its syllabus:

4. K.S.A. 44-510e(a) sets out the method for computing the extent of a permanent partial general disability, defines functional impairment, and limits disability awards in certain situations. A permanent partial general disability exists when an employee is disabled in a manner partial in character and permanent in quality that is not covered by the K.S.A. 44-510d schedule. Stated mathematically, the percentage of permanent partial general disability is equal to the percentage of task loss plus the percentage of wage loss divided by two.

5. Task loss percentage is defined by the plain language of K.S.A. 44-510e(a) as the percentage to which the employee, in the opinion of a physician, has lost the ability to perform the preinjury work tasks.

6. Wage loss percentage is defined by the plain language of K.S.A. 44-510e(a) as the difference between the preinjury average weekly wage and the postinjury

¹⁰ *Graham v. Dokter Trucking Group*, 284 Kan. 547, 161 P.3d 695 (2007).

weekly wage. Evidence of a physician's opinion is not necessary to support the existence of wage loss. Rather, it is simply calculated by the factfinder *[sic]*.¹¹

Claimant's average weekly wage at the time of his injury was \$708.52. Claimant testified he was unemployed for a month after his injury and then worked for Farmers Coop for about two months and made \$360 per week (\$9 per hour, 40 hours per week). Claimant testified at the preliminary hearing that he began working for Titus Transportation in August 2008. The only information on how long claimant worked there is contained in the December 16, 2010, report of Dr. Stein that states claimant worked as a mechanic for about one and one-half years. There is nothing in the record to indicate what claimant's wages were at Titus. Therefore, the Board finds claimant worked for Titus from August 1, 2008, through January 31, 2010, but failed to prove his wages.

Claimant worked as a self-employed truck driver from October 2010 until October 2011. The Board finds that claimant failed to prove a wage loss during the period of time he was a truck driver. Information, such as income receipts, expense records, financial statements or tax returns were not produced by claimant. Claimant did not testify what his weekly earnings were as a truck driver. Dr. Barnett indicated he relied on claimant's statement that he earned \$500 per week as a truck driver, but did not independently verify that information. Based on the Kansas Wage Survey, Mr. Zumalt estimated claimant's earnings as a truck driver were \$776.40 per week. If the Board averaged the weekly wages that Dr. Barnett and Mr. Zumalt estimated claimant earned post-injury as a truck driver, claimant's post-injury wages would be 90% or more than what he earned at the time of his injury.

After considering all the evidence, the Board concludes claimant had the following post-injury wages, wage loss and work disability:

<u>DATES</u>	<u>EMPLOYER</u>	<u>WAGES</u> (Per week)	<u>WAGE</u> <u>LOSS</u>	<u>TASK</u> <u>LOSS</u>	<u>WORK</u> <u>DISABILITY</u>
02/23/2008 thru 03/22/2008	Unemployed	0	100%	0%	50%
03/23/2008 thru 05/22/2008	Farmers Coop	\$360	49%	0%	24.5%
05/23/2008 thru 07/31/2008	Unemployed	0	100%	0%	50%

¹¹ *Id.*, at 547-548.

08/01/2008 thru 01/31/2010	Titus Transportation	Post-injury wages not proven	0%	0%	0%
02/01/2010 thru 09/30/2010	Unemployed	0	100%	0%	50%
10/01/2010 thru 10/14/2011	Truck Driver (Self-employed)	Post-injury wages not proven	0%	0%	0%
10/15/2011 thru the present	Fifth Wheel	\$480	32%	0%	16%

CONCLUSION

1. Claimant sustained a 5% whole person functional impairment as the result of his February 22, 2008, work-related injury.

2. Claimant sustained no task loss, but sustained wage loss and work disability as set out above.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.¹² Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board modifies the July 25, 2012, Award entered by ALJ Clark as follows:

Richard D. Steckly is granted compensation from Agco Corporation and its insurance carrier for a February 22, 2008, accident and resulting disability. Based upon an average weekly wage of \$708.52, Mr. Steckly is entitled to receive the following disability benefits:

¹² K.S.A. 2012 Supp. 44-555c(k).

For the period ending March 22, 2008, Mr. Steckly is entitled to receive 4.14 weeks of permanent partial general disability benefits at \$472.37 per week, or \$1,955.61, for a 50% work disability.

For the period from March 23, 2008, through May 22, 2008, Mr. Steckly is entitled to receive 8.71 weeks of permanent partial general disability benefits at \$472.37 per week, or \$4,114.34, for a 24.5% work disability.

For the period from May 23, 2008, through July 31, 2008, Mr. Steckly is entitled to receive 10 weeks of permanent partial general disability benefits at \$472.37 per week, or \$4,723.70, for a 50% work disability.

For the period from August 1, 2008, through January 31, 2010, Mr. Steckly is entitled to receive 20.75 weeks of permanent partial general disability benefits at \$472.37 per week, or \$9,801.68, for a 5% whole body functional impairment.

For the period from February 1, 2010, through September 30, 2010, Mr. Steckly is entitled to receive 34.57 weeks of permanent partial general disability benefits at \$472.37 per week, or \$16,329.83, for a 50% work disability.

For the period from October 1, 2010, through October 14, 2011, Mr. Steckly is entitled to receive no weeks of permanent partial general disability benefits as Mr. Steckly has no work disability for this period and the permanent partial general disability benefits for the 5% whole body functional impairment have already been awarded.

For the period from October 15, 2011, through March 20, 2012, Mr. Steckly is entitled to receive no weeks of permanent partial general disability benefits for a 16% work disability due to the accelerated payout provisions of the Workers Compensation Act.

For the period from March 21, 2012, through April 19, 2012, Mr. Steckly is entitled to receive 4.29 weeks of temporary total disability benefits at \$472.37 per week, or \$2,026.47. The total award is \$38,951.63, which is all due and owing less any amounts previously paid.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of April, 2013.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Matthew L. Bretz, Attorney for Claimant
matt@bretzpilaw.com

Robert G. Martin, Attorney for Respondent and its Insurance Carrier
rmartin@martinlawcenter.com

John D. Clark, Administrative Law Judge